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266 NLRB No. 20

D--9683
Traverse City, MI

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

D & L CONTRACTING, INC.

and

Case 7--CA--19555

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO

DECISION AND ORDER

Upon a charge filed on July 16, 1981, by International Union of Operating Engineers, Local 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO, herein called the Union, and duly served on D & L Contracting, Inc., herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on August 27, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and the complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that since on or about January 17, 1981, and

continuing thereafter, Respondent had failed and refused to make payments, required by the collective-bargaining agreement to the various fringe benefit funds established for the benefit of the employees of Respondent.

On September 22, 1981, Respondent's counsel filed an answer to the complaint. The General Counsel then issued an amended complaint on July 30, 1982, which alleges that Respondent had failed to make payments to, and failed to file required reports with, the various fringe benefit funds set out in the parties' collective-bargaining agreement. Respondent's counsel filed an answer to the amended complaint August 31, 1982. On September 1, 1982, however, Respondent's counsel withdrew its answer to the amended complaint.

Thereafter, on September 15, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on September 21, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a letter response to the Notice To Show Cause.[1]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations

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[1] The letter denied any alleged unfair labor practices but did not contest the validity of the summary judgment motion. The letter also did not attempt to justify Respondent's withdrawal of its answer to the complaint and it did not indicate that it should be considered as an attempt to file an answer. Rather, it primarily raised matters appropriately considered compliance matters. In such circumstances, we find there is no valid answer presently outstanding to the complaint allegations.

Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Section 102.20 of the Board's Rules and Regulations, Series 8, as amended, provides:

> The respondent shall, within 10 days from the service of the complaint, file an answer thereto. The respondent shall specifically admit, deny, or explain each of the facts alleged in the complaint, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. All allegations in the complaint, if not answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.

The amended complaint and notice of hearing served on Respondent specifically stated that, unless an answer to the amended complaint was filed within 10 days from the service thereof, ''all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.'' Although Respondent initially filed an answer to the amended complaint, it subsequently withdrew the answer. According to the uncontroverted allegations of the General Counsel's motion for summary judgment, on or about July 28, 1982, Respondent had advised the General Counsel that, after it had received the amended complaint, it would answer the complaint and would then withdraw the answer, and no other answer would be filed. This is what Respondent then did. Further, according to the

uncontroverted allegations of the General Counsel, Respondent was on notice, by the wording of the amended answer itself, and by the General Counsel's July 28, 1982, oral notification, of the consequences of its withdrawal of its answer. The withdrawal of an answer necessarily has the same effect as a failure to file an answer, and thus the allegations of the complaint must be deemed admitted as true as if no answer had ever been filed. No good cause to the contrary having been shown, in accordance with Section 102.20 of the Board's Rules set out above, the allegations in the amended complaint are deemed admitted and are found to be true. Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

At all times material herein, Respondent, a corporation duly organized under the laws of the State of Michigan, has maintained its only office and place of business at 1117 South Airport Road West, in Traverse City, Michigan, herein called the Traverse City place of business. Respondent is, and has been at all times material herein, engaged in the construction business.

During the year ending December 31, 1980, which period is representative of its operations at all times material hereto, Respondent performed services valued in excess of $50,000 for the State of Michigan. During the same period of time, the State of Michigan purchased and caused goods valued in excess of $50,000

to be shipped from points located outside the State of Michigan directly to its various facilities located within the State of Michigan.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

International Union of Operating Engineers, Local 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All operating engineers, mechanics, oilers and apprentice engineers employed by Respondent, but excluding guards and supervisors as defined in the Act.

At all times material herein, the Charging Party has been, and is now, the exclusive representative of Respondent's employees in the above unit for purposes of collective bargaining. Respondent and the Charging Party have entered into a series of successive collective-bargaining agreements, the most recent of which is effective by its terms from September 1, 1980, through September 1, 1983. This collective-bargaining agreement provides, inter alia, for the filing of reports regarding, and

for the payment by Respondent of moneys into, various fringe benefit funds established for the benefit of employees of Respondent.

Since on or about January 17, 1981, and continuing to date, Respondent has failed and refused to make the payments to the various fringe benefit funds as required by the collective-bargaining agreement.[2] Respondent has also failed and refused to file the required reports to the various fringe benefit funds since on or about March 15, 1981. Although these acts changed and modified the provisions of the collective-bargaining agreement, Respondent did not comply with the notice requirements of Section 8(d) of the Act.

Accordingly, we find that by failing to comply with the notice requirements of Section 8(d) of the Act, Respondent did refuse to bargain collectively and is refusing to bargain collectively with the exclusive representative of its employees, and thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) of the Act. We further find that by failing to file the required reports and make the required payments to the various fringe benefit funds as

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[2] The above statement is based on par. 11(a) of the amended complaint. At par. 11(b), the amended complaint further alleges that Respondent has failed to make the required payments since on or about June 1, 1979. However, Sec. 10(b) of the Act provides that no complaint shall issue based upon any unfair labor practices occurring more than 6 months prior to the filing of a charge. Accordingly, since the charge in this case was filed on July 16, 1981, the proper date from which to measure Respondent's obligation to make payments to the funds is January 17, 1981, which is the date specified in par. 11(a). The allegation in par. 11(b) is therefore dismissed.

provided for in the collective-bargaining agreement, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

We have found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without notice or discussion with the Union, failing and refusing to make the contributions to the employees' fringe benefit funds as required by the collective-bargaining agreement. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by paying into the various funds the

provided for in the collective-bargaining agreement, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, thereby violating Section 8(a)(1) of the Act.

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We have found that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally, and without notice or discussion with the Union, failing and refusing to make the contributions to the employees' fringe benefit funds as required by the collective-bargaining agreement. In order to dissipate the effect of these unfair labor practices, we shall order Respondent to make whole its employees by paying into the various funds the

amount which should have been paid pursuant to the terms of the collective-bargaining agreement, retroactive to January 17, 1981.[3]

Conclusions of Law

1. D & L Contracting, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All operating engineers, mechanics, oilers and apprentice engineers employed by Respondent, but excluding guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

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[3] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide for interest at a fixed rate on fund payments due as part of a ''make-whole'' remedy. We therefore leave to further proceedings the question of how much interest Respondent must pay into the benefit fund in order to satisfy our ''make-whole'' remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. See Merryweather Optical Company, 240 NLRB 1213, fn. 7 (1979).

5. By failing and refusing since on or about January 17, 1981, to make payments to, and since on or about March 15, 1981, to file reports with the various fringe benefit funds for the benefit of employees, as required by provisions of the collective-bargaining agreement, and by failing to comply with the notice requirements of Section 8(d) of the Act, Respondent has refused to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate bargaining unit described above and thereby has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, D & L Contracting, Inc., Traverse City, Michigan, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with International Union of Operating Engineers, Local 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO, by unilaterally and without notice to or discussion with the aforesaid Union, failing and refusing to make payments to and file reports with various fringe benefit funds

for the benefit of employees as required by the collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment. The appropriate unit for the purposes of collective bargaining is:

> All operating engineers, mechanics, oilers and apprentice engineers employed by Respondent, but excluding guards and supervisors as defined in the Act.

(b) Make whole its employees by making payments into the various fringe benefit funds in the manner set forth in the section of this Decision entitled ''The Remedy.''

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility at Traverse City, Michigan, copies of the attached notice marked ''Appendix.''[4] Copies of said

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading ''POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD'' shall read ''POSTED PURSUANT TO A (continued)

notice, on forms provided by the Regional Director for Region 7, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. February 2, 1983

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

Robert P. Hunter, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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[4] JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.''

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively with International Union of Operating Engineers, Local 324, 324--A, 324--B, 324--C and 324--D, AFL--CIO, by unilaterally, and without notice to or discussion with that union, failing and refusing to file reports with, and to contribute to the various fringe benefit funds for the benefit of employees the sums of money required under the terms of the collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment. The bargaining unit is:

> All operating engineers, mechanics, oilers and apprentice engineers employed by Respondent, but excluding guards and supervisors as defined in the Act.

WE WILL make our employees whole by contributing to the various benefit funds the sums of money required under the terms of the collective-bargaining agreement since on or about January 17, 1981.

D & L CONTRACTING, INC.

(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Patrick V. McNamara Federal Building, 477 Michigan Avenue, Room 300, Detroit, Michigan 48226, Telephone 313--226--3244.